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Nos. 82-1731, 82-1732 and 82-1815

In the Supreme Court of the United States

OCTOBER TERM, 1983

ROBERT C. HERZFELD, ET AL., PETITIONERS

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO AND THE HONORABLE FRED M. WINNER, ET AL.

ROBERT F. BROWN, ET AL., PETITIONERS

v.

TRENTON H. PARKER, ET AL.

ELIZABETH EKEN, ET AL., PETITIONERS

v.

INTERNATIONAL MINING EXCHANGE, INC., ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court was authorized to use the assistance of a receiver to effectuate a plan of restitution ordered as a condition of probation pursuant to 18 U.S.C. 3651.

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OPINIONS BELOW

The opinion of the court of appeals (Herzfeld Pet. App. 1a-12a)[1] is reported at 699 F.2d 503. The February 9, 1982 order of the United States District Court for the District of

[1] "Herzfeld Pet. App." refers to the Appendix to the Petition in No. 82-1731. "Brown Pet. App." refers to the Appendix to the Petition in No. 82-1732. "Eken Pet. App." refers to the Appendix to the Petition in No. 82-1815.

Colorado, authorizing a receiver (Herzfeld Pet. App. 13a-14a) (Winner, J.) is not reported. The July 26, 1982 memorandum opinion and order of the same court (*id.* at 16a-20a) (Kane, J.), denying a motion to transfer funds and quashing writs of garnishment, is not reported. The July 26, 1982 order of the same court (*id.* at 21a-22a) (Winner, J.), concerning the supervision of the restitution fund, is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 31, 1983. Petitions for rehearing were denied on March 7, 1983 (Brown Pet. App. 19a-20a). Petitions for a writ of certiorari were filed on April 25, 1983 (Nos. 82-1731, 82-1732), and on May 5, 1983 (No. 82-1815). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In September 1979, Trenton H. Parker, the International Mining Exchange, Inc. ("IME"), and others began promoting the "Gold Tax Shelter Investment Program." The program was a massive scheme to defraud investors through the use of a spurious tax shelter plan, and Parker and IME in fact defrauded investors of millions of dollars.[2] This scheme resulted in criminal and civil litigation in the United States District Court for the District of Colorado, and civil litigation in the United States District Court for the District of New Jersey.

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[2]In brief, the "Gold Tax Shelter Investment Program" invited investors to provide capital for the development of gold mines in French Guiana and Alaska and promised in return a tax deduction amounting to 500% of the investment and a share of the profits realized on the gold extracted from the mines. The scheme entailed the use of false representations, counterfeit documents, and fictitious business entities. See *SEC* v. *International Mining Exchange, Inc.*, 515 F.Supp. 1062, 1065-1066, 1070 (D. Colo. 1981).

2. In July 1981, a federal grand jury in the District of Colorado returned a 20-count indictment charging Parker, IME, and another IME officer with mail fraud, wire fraud, assisting in the preparation of false income tax returns, and failing to file income tax returns. The charges were based on the Gold Tax Shelter scheme.

On February 9, 1982, pursuant to an agreement negotiated at midtrial, Parker pleaded guilty.[3] The plea agreement called for Parker to transfer to the custody of the Colorado District Court the proceeds of his fraudulent scheme for the purpose of recompensing the defrauded investors (Herzfeld Pet. App. 24a). On the same day, the district court appointed a receiver to effectuate this aspect of the plea agreement.[4] The court ordered the receiver to take custody of the tainted proceeds, invest them, identify the defrauded investors, and subject to the court's approval, recompense the investors on a pro rata basis (Herzfeld Pet. App. 13a-14a). As a result of the plea agreement, Parker

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[3]Parker pleaded guilty to one count of mail fraud (18 U.S.C. 1341), one count of perjury (18 U.S.C. (& Supp. V) 1623) (a charge brought in a separate indictment), one count of assisting in the preparation of a false income tax return (26 U.S.C. 7206(2)), and two counts of failing to file an income tax return (26 U.S.C. 7203). On the last four counts, Parker was sentenced to a total of eight years' imprisonment. On the mail fraud count, Parker's sentence was suspended in favor of five years' probation to begin at the end of his imprisonment.

[4]On March 26, 1982, the district court sentenced Parker pursuant to his guilty pleas. The court ordered that Parker's agreement to make restitution to the victims of his fraud be a condition of his probation under the mail fraud count. The court also ordered as a condition of probation that Parker "cooperate fully with the Receiver and the United States Attorney's office to insure appropriate and equitable settlement of all claims of such defrauded investors" (S. Tr. 8).

turned over to the Colorado District Court approximately $6 million.[5]

3. In July 1980, prior to Parker's guilty plea, petitioners Herzfeld, Brown, and RFB Petroleum, Inc., began separate civil actions, which were later consolidated, in the United States District Court for the District of Colorado against Parker, IME, and other defendants.[6] These actions arose from the same fraudulent scheme that led to Parker's indictment. The complaints alleged that the defendants had violated federal and state securities laws, committed common law fraud, and breached contracts, fiduciary duties, and warranties.

On September 8, 1981, the Colorado District Court entered a default judgment against the defendants for egregious abuse of the discovery process. The court awarded the plaintiffs approximately $4 million, a sum comprising actual and punitive damages, attorney's fees, and costs (Herzfeld Pet. App. 5a, 17a).

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[5]Parker had been holding these funds in an account at a branch of Barclays Bank International, Ltd., located on Grand Cayman in the Cayman Islands. In February 1982, at Parker's request, the bank transferred approximately $5.6 million to an account at the United Bank of Denver opened by an Assistant U.S. Attorney and Parker's attorney, acting as trustees, for the purpose of receiving the funds. Later, the trustees transferred the funds to the registry of the Colorado District Court, and in late February and early March 1982 the clerk of the court transferred the funds to the receiver. The receiver immediately invested the funds in certificates of deposit. The $6 million figure represents the $5.6 million transferred from Grand Cayman and accumulated interest. The funds remain under the control of the receiver in interest-bearing certificates of deposit.

[6]Herzfeld filed his complaint on July 2, 1980. *Herzfeld* v. *Parker*, Civ. No. 80-K-850 (D. Colo.). Brown and RFB Petroleum filed their complaint on July 3, 1980. *Brown* v. *Parker*, Civ. No. 80-K-859 (D. Colo.).

4. In December 1981, also prior to Parker's guilty plea, petitioners Eken and Johnson filed a class action against Parker, IME, and others in the United States District Court for the District of New Jersey. This action, too, arose from Parker's fraudulent scheme (Herzfeld Pet. App. 5a, 17a). The complaint alleged that, in promoting and selling the Gold Tax Shelter Investment Program, the defendants had violated federal and state securities laws and state consumer-fraud laws, committed common law fraud, and breached contracts and fiduciary duties.

On January 29, 1982, the New Jersey District Court issued a temporary restraining order freezing the assets of Parker and IME then held in domestic and foreign banks, including the Grand Cayman branch of Barclays Bank International, Ltd., where Parker was holding approximately $5.6 million in assets. On February 9, the court extended the TRO and amended it to permit transfer of the assets of Parker and IME to the custody of the Colorado District Court. Later, on February 17, it issued a preliminary injunction substantially identical to the TRO, which permitted the transfer of Parker's assets to any federal district court (Herzfeld Pet. App. 6a-7a).

On April 16 and May 3, 1982, the New Jersey District Court provisionally certified the case as a class action on behalf of all investors in the "Gold Tax Shelter Investment Program" and entered a default judgment against Parker and IME for $8.1 million (Eken Pet. App. 3a-6a).

5. On April 19, 1982, the New Jersey plaintiffs instituted proceedings in the Colorado District Court to secure the transfer of the $6 million held by the Colorado receiver to the New Jersey District Court to satisfy their default judgment. Specifically, the New Jersey plaintiffs filed a certification of their judgment, a motion for consolidation with the Colorado plaintiffs' case, and a motion for transfer of

funds; they also served writs of garnishment on the Colorado receiver and trustees.[7] The Colorado plaintiffs, also seeking to satisfy their default judgment from the $6 million fund, served their own writs of garnishment on the receiver and trustees.

On July 26, 1983, Judge Kane issued an order disposing of these matters. Judge Kane reasoned that the central issue was the legality of the receivership established by Chief Judge Winner as an incident to Parker's guilty plea. Judge Kane held, however, that he could not consider that issue because he had no power to review an order of a coordinate judge. As a result, he denied relief to the New Jersey and Colorado plaintiffs and thus left the receivership unaffected. Judge Kane certified an appeal under 28 U.S.C. 1292(b) (Herzfeld Pet. App. 16a-20a).[8]

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[7] *Eken* v. *International Mining Exchange, Inc.*, Civ. No. 82-J-17 (D. Colo. filed Apr. 19, 1982).

[8] Later that day, Chief Judge Winner issued an order setting out in greater detail the authority and responsibilities of the receiver (Herzfeld Pet. App. 21a-22a). Subsequently, Judge Winner issued orders allowing payments for the receiver's expenses.

While the question of control over the funds held by the Colorado receiver was being litigated in the Colorado District Court, the New Jersey plaintiffs searched for additional assets of Parker and IME. As a result, on May 4, 1982, the New Jersey District Court ordered the Banque Nationale de Paris Guyane to transfer assets being held in Parker's name to the Midlantic National Bank in Newark, as receiver, for the benefit of the New Jersey plaintiffs. The court also ordered Parker to execute a document authorizing the transfer. Parker did not comply with the order; instead, on May 26, he executed a document assigning his interest in the assets in his account at the Banque National de Paris Guyane to the United States and authorizing the transfer of the assets to an account to be designated by one of the Assistant United States Attorneys in Colorado assigned to Parker's criminal case.

Officials of the Banque Nationale de Paris subsequently transferred approximately $400,000 to the Midlantic National Bank.

6. The court of appeals consolidated appeals in all these matters to consider the validity of the Colorado receivership (Herzfeld Pet. App. 1a-12a). The court held that the receivership was valid, relying principally on 18 U.S.C. 3651, which provides: "While on probation and among the conditions thereof, the defendant * * * [m]ay be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had * * *." The court reasoned that the power to order restitution entailed the power to effectuate restitution, and concluded that the complexity of the restitution here necessitated the establishment of a receivership. The court also noted that Parker's plea agreement (Herzfeld Pet. App. 10a-11a) called for the transfer of the proceeds of his fraudulent scheme to a court-appointed receiver, who in turn was required to make restitution to the defrauded investors. Because the receivership was valid, the court of appeals affirmed the denial of relief to the Colorado and New Jersey plaintiffs (*id.* at 12a).

ARGUMENT

1. Petitioners contend (Herzfeld Pet. 7-13; Brown Pet. 7-14; Eken Pet. 17-19) that the Colorado District Court had no authority to appoint a receiver to effectuate the restitution plan agreed to by Parker and the government. This contention was properly rejected by the court of appeals and warrants no further review by this Court.

The authority of the district court to order restitution as a condition of Parker's probation is explicitly provided by statute: "While on probation and among the conditions thereof, the defendant * * * [m]ay be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had" (18 U.S.C. 3651). Petitioners do not deny that Section 3651 empowered the district court to order restitution. Nor do they point to anything in the legislative history

of that statute that conflicts with the court of appeals' conclusion that the authority to order restitution entails the authority to use the means appropriate to accomplish restitution (Herzfeld Pet. App. 8a). See H.R. Rep. No. 1377, 68th Cong., 2d Sess. (1925). Instead, petitioners simply assert that the restitution order at issue is "unprecedented" (Herzfeld Pet. 9) and will profoundly affect the administration of criminal justice in the federal system.

Contrary to petitioners' assertion, the restitution order represents no departure from settled practice under Section 3651. Restitution orders have often involved large amounts of money. See *United States* v. *Barringer*, Nos. 82-5017(L) and 82-6159 (4th Cir. June 16, 1983) ($1.8 million); *United States* v. *Lynch*, 699 F.2d 839, 845-846 (7th Cir. 1982) ($100,000); *United States* v. *Grugette*, 678 F.2d 600, 604 (5th Cir. 1982) ($50,000); *United States* v. *Roberts*, 619 F.2d 1, 2 (7th Cir. 1979) ($750,000); *United States* v. *Tiler*, 602 F.2d 30, 33-34 (2d Cir. 1979) ($100,000); *United States* v. *Boswell*, 565 F.2d 1338, 1342-1343 (5th Cir.), cert. denied, 439 U.S. 819 (1978) ($71,000). As a result, courts have on occasion relied on the assistance of court officers to carry out a restitution plan. In *United States* v. *Roberts*, *supra*, the court of appeals approved a restitution plan in which a receiver was to identify the victims of a scheme to defraud, numbering more than 30,000, and distribute to them the $750,000 recovered from the defendant. 619 F.2d at 2. In *United States* v. *Boswell*, *supra*, a similar task was assigned to a probation officer. 565 F.2d at 1342-1343. The use of a receiver in this case to assist the district court in determining whom Parker defrauded and in what amounts breaks no new ground under Section 3651 and is entirely consistent with the purpose of that statute.

2. Petitioners Eken and Johnson claim (Eken Pet. 16-17) that the restitution order here conflicts with cases holding that such an order must identify the aggrieved parties and

the amount of their loss. These cases, however, are plainly inapposite, for they involved restitution orders imposing obligations on criminal defendants that were attended by substantial uncertainty. For example, in *United States* v. *Taylor*, 305 F.2d 183, 186-187 (4th Cir.), cert. denied, 371 U.S. 894 (1962), the amount owed by the defendant to the Internal Revenue Service (the defrauded party) had not been determined when he was ordered to pay his tax liability for previous years as a condition of probation. Similarly, in *United States* v. *Hoffman*, 415 F.2d 14, 21 (7th Cir.), cert. denied, 396 U.S. 958 (1969), the court held that "the conditioning of probation upon restitution of a sum of money to be [subsequently] determined is violative of 18 U.S.C. § 3651 * * *."

Here, by contrast, Parker's obligation to make restitution, which was agreed to during plea negotiations and made part of the plea agreement, was unambiguous: he was to turn over to the court "all remaining proceeds of the scheme to defraud" (Herzfeld Pet. App. 24a). Thus, Parker knew exactly how much money he was required to turn over as a condition of his probation and unlike the defendants in the cases on which petitioners Eken and Johnson rely, he does not challenge the restitution order. The conflict posited by petitioners Eken and Johnson does not exist and therefore provides no basis for review by this Court.

3. Petitioner Herzfeld contends (Herzfeld Pet. 14-16) that Section 3651 may lead to a restitution scheme that arbitrarily favors some aggrieved parties over others because of the requirement that restitution be limited to the " 'loss caused by the offense for which conviction was had.' " Specifically, Herzfeld argues that this requirement, coupled with the manner in which charges are brought in an indictment or a defendant's decision to plead guilty to certain counts, will result in inequitable restitution plans. Whatever merit this claim may have — and we submit it has none, see

United States v. *McMichael*, 699 F.2d 193, 195 (4th Cir. 1983) (scope of restitution not limited by counts to which defendant pleaded guilty); *United States* v. *Davies*, 683 F.2d 1052, 1054-1055 (7th Cir. 1982) (same); *Phillips* v. *United States*, 679 F.2d 192, 194 (9th Cir. 1982) (same); but cf. *Dougherty* v. *White*, 689 F.2d 142, 145 n.1 (8th Cir. 1982); *United States* v. *Buechler*, 557 F.2d 1002, 1007-1008 & n.10 (3d Cir. 1977) — the issue is not presented in this case. The restitution scheme ordered by the district court calls for restitution to all defrauded investors on a pro rata basis (see Herzfeld Pet. App. 13a). Clearly, no investor has been favored over another.

4. In any event the question of restitution under Section 3651 lacks continuing importance. Section 5 of the Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1253 (to be codified at 18 U.S.C. 3579-3580), substantially amended the law governing restitution. The 1982 Act describes when restitution may be ordered and prescribes procedures for issuing orders of restitution (96 Stat. 1253-1255).[9] These provisions now govern restitution in connection with all Title 18 offenses (96 Stat. 1253). Accordingly, there is no need for this Court to resolve questions about the proper interpretation of the terse language of Section 3651. If significant questions pertaining to restitution remain, they will be more adequately framed in cases arising under the new Act.

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[9]The discussion in the Senate Report (S. Rep. No. 97-532, 97th Cong., 2d Sess. 33 (1982)) quoted by petitioners Brown and RFB Petroleum, Inc. (Brown Pet. 12), refers to a provision of the bill that was not enacted. Compare S. Rep. No. 97-532, *supra*, at 7, with 96 Stat. 1254.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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